UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

THE STATE OF GEORGIA; GEORGIA DEPARTMENT OF COMMUNITY HEALTH,

PLAINTIFFS,

v.

CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services; et al.,

DEFENDANTS.

CIVIL ACTION NO. 2:22-cv-6-LGW-BWC

Reply in Support of Plaintiffs' Motion for Summary Judgment, Opposition to Defendants' Motion to Dismiss, and Opposition to Defendants' Motion for Summary Judgment

Defendants are unable to overcome the fundamental legal flaws in CMS's Recission of the core provisions of Georgia's Pathways to Coverage demonstration project. The purpose of the Medicaid program is to provide healthcare coverage, and Pathways would *expand* coverage to tens of thousands of Georgians who are not currently eligible. Yet CMS has now attempted an unprecedented bait-and-switch that would leave the expansion in place while removing the qualifying hours and premium payment requirements that were central to Georgia's willingness to undertake the expansion in the first place. Simply put, there is no ambiguity here: Georgia is attempting to expand Medicaid coverage, but CMS has upended the program in a way that will make the expansion impossible to effectuate. This is directly contrary to Supreme Court precedent and Section 1115 of the Social Security Act and violates both the reasoned decisionmaking requirement and procedural rules of the Administrative Procedure Act. This Court should enter judgment for Plaintiffs, set aside CMS's Recission, and allow Pathways to go into force as originally negotiated and planned.

ARGUMENT

I. The Recission Is Judicially Reviewable.

Defendants' brief argument (at 11) that the Recission is committed by law to agency discretion is wholly without merit. Far from the blanket conferral of discretion described by Defendants, Section 1115 provides the quintessential judicially-administrable standard to apply—the Secretary must determine whether a demonstration will "assist in promoting the objectives" of Medicaid. 42 U.S.C. §1315(a). This is a far cry from the types of statutes that "provide[] absolutely no standards that constrain the [agency's] discretion" that commit a decision to an agency's discretion. *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1084 (11th Cir. 2012) (finding no manageable standard to assess agency's "refusal to initiate rulemaking" about critical habitat for endangered species).

Every court to consider the issue has held that Section 1115 determinations are not committed to agency discretion by law. As the D.C. Circuit recently observed, Section 1115 "provides the legal standard" that courts must employ when reviewing demonstration project decisions: "The Secretary may only approve 'experimental, pilot, or demonstration project[s],' and only insofar as they are 'likely to assist in promoting the objectives' of Medicaid." Accordingly, Section 1115 is not "among the rare 'categories of administrative decisions that courts traditionally have regarded as committed to agency discretion.'" *Gresham v. Azar*, 950 F.3d 93, 98-99 (D.C. Cir. 2022), *vacated and remanded sub nom. on other grounds Becerra v. Gresham*, 2022 WL 1131358 (U.S. Apr. 18, 2022). Similarly, the Ninth Circuit has held that "the granting of an exemption from statutory requirements is not an area of agency discretion traditionally unreviewable ... [and] it would be somewhat surprising were Congress to grant unreviewable discretion to the Secretary to exempt States from such an all-encompassing series of statutory requirements." *Beno v. Shalala*, 30 F.3d 1057, 1067 (9th Cir. 1994). Because Section 1115 "does not give the Secretary unlimited discretion" and "provides a meaningful standard by which to judge the Secretary's waiver," "[e]very court which has considered the issue has concluded that §

1315(a) waivers are subject to APA review." *Id.* at 1067 & n.24 (collecting cases); *see also Texas v. Brooks-LaSure*, 2021 WL 5154219, at *7 (E.D. Tex. Aug. 20, 2021) ("[E]very court to have considered the issue has held that CMS decisions regarding the approval of § 1115 demonstration projects and the concomitant waivers of statutory, default requirements are reviewable under the APA.").

Defendants' plea (at 11-12) for extreme deference must also be rejected. The Medicaid Act requires the Secretary to make a legal judgment on whether the demonstration will further statutory objectives. Yet the cases Defendants cite concern predictive factual judgments rather than legal determinations. *See Sunshine State Bank v. Fed. Deposit Ins. Corp.*, 783 F.2d 1580, 1582 (11th Cir. 1986) (noting deference to "commissioned bank examiners in assigning loan classifications"); *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1106 (D.C. Cir. 2009) (deferring to agency prediction regarding the preservation of universal wireless phone coverage); *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989) (noting deference to decision implicating the "efficient operation of the Air Force"). In sum, Section 1115 waiver determinations are legal conclusions of the kind courts routinely review—and invalidate when they contravene the relevant statutory text or rest on arbitrary and capricious decisionmaking. *See Stewart v. Azar*, 313 F. Supp. 3d 237, 256 (D.D.C. 2018) ("Some [] courts have upheld the Secretary's judgment, while others have struck down his approval. None of those courts, however, struggled to find some 'law to apply.'") (internal citations omitted).

II. The Recission is Contrary to Law.

A. The Act and its regulations do not authorize the Recission.

Notably, Defendants do not argue that Section 1115 itself provides CMS with authority to reconsider its approval of a duly authorized demonstration project. Instead, Defendants point (at 12-15) to regulations and the Special Terms and Conditions (STCs) for authority to reconsider its approval over a year later. Neither supplies such authority.

First, contrary to Defendants' suggestion (at 12-13), 42 C.F.R. §431.420(d)(2) does not provide for pre-implementation reconsideration of an approved waiver. Instead, it allows the Secretary to "withdraw waivers or expenditure authorities based on a finding that the demonstration project is not likely to achieve the statutory purposes." To coherently make such a determination, the demonstration project must actually be in effect, not simply approved. By contrast, 42 C.F.R. §431.420(d)(1) provides that the "Secretary may suspend or terminate a demonstration in whole or in part, *any time before the date of expiration*, whenever it determines that the State has materially failed to comply with the terms of the demonstration project." (emphasis added). Read together, it is clear that the Secretary can issue pre-implementation suspensions or determinations only upon a finding that the State has failed to "comply with the terms of the demonstration project." That is not what CMS did here. Instead, it tried to fit a round peg—a reconsideration of the approval before the program had even been launched—into a square hole—§431.420(d)(2)'s authority to rescind an implemented waiver's failure to actually further the Act's purposes. And Defendants' reliance on the STCs (at 12-13) is unavailing for the same reasons. Like the regulations, STC 10 assumes that CMS can withdraw an already implemented demonstration only by "determin[ing] that *continuing* the expenditure authorities would no longer be in the public interest or promote the objectives of" the Act. (emphasis added). The invocation of that authority makes little sense in the context of an approved-but-not-yet-launched demonstration project.

Lacking any statutory authority for its withdrawal, CMS invokes (at 14-15) its inherent authority to reconsider past decisions. But CMS comes nowhere close to clearing the high bar of establishing inherent authority to reconsider the Approval. A reconsideration based on inherent authority must "(1) be made within a reasonable time after the original decision; (2) be preceded by notice to the parties of the agency's intent to reconsider; and (3) not be arbitrary, capricious, or an abuse of discretion." *Texas*, 2021 WL 5154219, at *8 (citing *ConocoPhillips Co. v. E.P.A.*, 612 F.3d 822,

832 (5th Cir. 2010); *Dun & Bradstreet Corp. Found. v. USPS*, 946 F.2d 189, 193 (2d Cir. 1991)). The arbitrary and capricious prong is addressed extensively below. Defendants provide no rebuttal on the timeliness point.

An inherent authority reconsideration can be made only after a time lapse that is "short and reasonable." *Texas*, 2021 WL 5154219, at *8 (collecting cases). Paradigmatic examples of short and reasonable time periods "are all a month or less." *Id.* For example, "[t]he Supreme Court allows 25 days (Rule 58); this court allows 30 days (Rule 68); the Federal Rules of Civil Procedure allow 10 days (Rule 59); the Federal Rules of Criminal Procedure allow 5 days, generally (Rule 33)." *Id.* Here, the period between the Approval (October 15, 2020) and the Recission (December 23, 2021) is well over a year and far beyond any conception of a reasonable time lapse. *Id.* Moreover, the time lapse is not short and reasonable in light of Georgia's "reasonable reliance," discussed in greater depth below, on the final approval that "resulted from a complex negotiation process between CMS and [Georgia] and thus reasonably led [Georgia] to immediately begin intense preparation efforts for implementing the program." *Id.* Finally, the initial Approval is thoroughly reasoned and supported, and the delay far exceeds any definition of "short." *Id.* (four-month gap between Section 1115 decision and reconsideration unreasonable).[1]

Defendants' attempt (at 15-16) to distinguish *Texas v. Brooks-LaSure* boils down to drawing a series of distinctions that make no legal difference.

First, Defendants state that CMS did not purport to follow a statutory or regulatory process in withdrawing Texas's waiver. But, as discussed above, that is because CMS has no authority to reconsider a waiver approval. *See also Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 233 (5th Cir. 2019)

[1] Contrary to Defendants' assertion (at 15), CMS did not follow the appropriate "procedures for review" in rescinding Pathways. Rather, as discussed below, CMS unilaterally withdrew from an agreement entered between the State and CMS that set out specific procedures for reviewing and rescinding Pathways.

("Once the [Administrator] authorizes a demonstration project, no take-backs."). And Defendants cannot circumvent this restriction by dressing up a reconsideration in the garb of 42 C.F.R. §431.420(d)(2)'s supervisory authority over an implemented demonstration. That is especially true here because the Recission itself is upfront that it is an attempt to reconsider CMS's prior approval of Pathways. *See, e.g.*, Ex. 8 at 4 ("CMS has reevaluated both the risks posed by the pandemic and its aftermath and the potential benefits of continuing the work requirement. Based on this reanalysis, CMS has determined that the earlier approval overweighed the potential benefits to Georgia's Medicaid program from the work requirement while under-weighing the requirement's potential negative effects, particularly in light of the ongoing pandemic."). CMS's attempt to circumvent *Texas* by calling a reconsideration something that it is not for purposes of litigation does not constitute a material distinction.

Second, Defendants assert that, in *Texas*, CMS "did not purport to reconsider whether Texas's program ... would in fact meet the objectives and limitations stated in § 1115(a)." But the court only found that factor relevant in discussing one of six timeliness factors—the complexity of the decision being reconsidered. Even if the decision here was more complex, that might justify a few extra months beyond the four months found unreasonable in *Texas*—not the nearly year and a half gap between the Approval and Recission here.

Third, Defendants note the "probable impact of an erroneous agency decision absent reconsideration" did not "move the needle much either way" in *Texas*. But Defendants fail to explain why that is not the case here, where the Recission would prevent Georgia from implementing a novel program that would extend coverage to tens of thousands of additional individuals. And, as discussed below, it is the Recission that impacts reliance interests and circumvents notice and comment requirements—not the Approval.

Fourth, Defendants assert that CMS did not provide Texas notice of its intent to reconsider. But Georgia has never contested this element of the inherent reconsideration factors. Because each factor is an independently sufficient reason to vacate the Recission, Georgia's showing that the delay between Approval and Rescission is not short and reasonable, and that the Recission is arbitrary and capricious, is more than sufficient to set aside the Recission.

B. The Recission Violates Section 1115 of the Act.

Defendants assert (at 17-18) that courts may not review Section 1115 demonstration decisions for compliance with the underlying statute. But Defendants are wrong to suggest that Georgia identifies "no actual conflict between the text of Section 1115 and the agency's withdrawal." Georgia argued at length (at 16-18) that the Recission is directly contrary to Section 1115's requirement that demonstration projects "assist in promoting the objectives" of the Act. 42 U.S.C. §1315(a). The Act in turn "consistently focuses on providing access to health care coverage," *Gresham*, 950 F.3d at 100, and "to enable states to provide medical services to those whose 'income and resources are insufficient to meet the costs of necessary medical services....'" *Pharm. Rsch. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001), 538 U.S. 644 (2003). It is undisputed that under the carefully negotiated and approved Pathways program, tens of thousands more individuals would have gained access to Medicaid coverage. Under the Recission, fewer individuals will have access to such coverage. Accordingly, the Recission, which will indisputably result in less coverage, directly conflicts with Section 1115's command that the Secretary make demonstration decisions based on whether the demonstration will result in more or less coverage than a world without the demonstration.

Moreover, as Georgia explained at length (without meaningful response from Defendants), CMS's interpretation of Section 1115 would eviscerate that entire section. By employing a full-expansion baseline, CMS ensures that *no demonstration*—short of full, unconditional expansion to all individuals now eligible under the Affordable Care Act—would ever pass muster. This is directly

contrary to the text, structure, and purpose of Section 1115, which is to ensure that Medicaid requirements do not "stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients." S. Rep. No. 87-1589, at 19 (1962), reprinted in 1962 U.S.C.C.A.N. 1943, 1961. Because CMS's interpretation forecloses States' ability to experiment with programs that expand Medicaid selectively, it is contrary to Section 1115.

In sum, Georgia does not merely attack CMS's substantive *reasoning*; rather, it has demonstrated that CMS's *action* violates Section 1115. Because the Recission will indisputably result in less coverage in Georgia, it is contrary to law.[2]

III. The Recission is Arbitrary and Capricious.

A. The Recission's changed factual findings and disregard of reliance interests violate the bedrock requirement of reasoned decisionmaking.

Tellingly, Defendants begin their arbitrary and capricious discussion (at 19-20) by again beseeching the Court to review CMS's work product with "exceeding" deference. But courts "are not a rubber stamp" in arbitrary and capricious review. *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1263 (11th Cir. 2020); *accord Health Freedom Def. Fund, Inc. v. Biden*, 2022 WL 1134138, at *13 (M.D. Fla. Apr. 18, 2022); *see also Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021) (arbitrary and capricious review "'is not toothless'"). Indeed, "after *Regents*," arbitrary and capricious review "has serious bite." *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021). In particular, when, as here, the challenged agency decision "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must

[2] Defendants erroneously assert that Georgia "cursorily" dismisses the importance of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, 134 Stat. 178 (2020). Georgia (at 18) explained at length why the FFCRA was a red herring that did not justify the Recission. Although the FFCRA requires States to treat someone who enrolls during the "emergency period" as eligible until the emergency period ends, that does not affect the centerpiece of Pathways—namely, the pathway to coverage requirement, which imposes prerequisites *prior to enrollment*, which is not impacted by the FFCRA's post-enrollment requirements.

be taken into account" the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Defendants' justifications for the Recission cannot withstand any level of scrutiny.

First, Defendants never come to terms with the extent of the burdens and increased costs the Recission would place on Georgia. For three years, Georgia has enacted legislation, expended resources, created programs, hired staff, and engaged with the private sector in direct reliance on Georgia Pathways. *See* MSJ 11, 13, 22-24. Now all of that will be in vain. And it is no answer to say that Georgia can just implement full, condition-free expansion. It is simply impossible for the State to implement Pathways without the qualifying activities and premium requirement. CMS itself recognized that doing so would entail over 200,000 additional potential enrollees, costing the State hundreds of millions more than the FY 2022 budgeted amount. *See* Ex. 8 at 12 n.31 ("This would cost the state about $650 million in the first year, higher than the $76 million proposed in the fiscal year 2022 budget under the demonstration.").

Second, Defendants do not even attempt to justify CMS's failure to address Georgia's massive reliance interests in the Pathways Approval. CMS never addressed the fact that Georgia budgeted $27,169,720 for fiscal year 2021 through the first quarter of 2023 for the development of the Georgia Gateway system components, improvements, and project management functions necessary for successful implementation of Pathways. Ex. 9 at 92. Or that Georgia hired and assigned 31 state employee personnel full-time equivalents to support Pathways implementation project activities. *Id.* at 39. And CMS failed to justify ignoring Georgia's close collaboration with care management organizations and vendors on program implementation activities regarding eligibility and enrollment, customer service, and general project management. *Id.* at 51. CMS's failure to consider these reliance interests "alone is fatal." *See, e.g.*, *Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021); *see also Dep't of*

Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1913 (2020) ("It would be arbitrary and capricious to ignore such matters.").[3]

Third, Defendants (at 20) make the argument that a program that will expand coverage to an entirely new category of participants will not increase coverage. But no amount of "thorough analysis" can change the simple fact that Pathways as originally approved would have increased the eligible population for Medicaid coverage by 64,336 individuals. *See* Ex. 2 at 8. In the Recission, CMS never grapples with the Approval's finding that coverage would be expanded to tens of thousands of new recipients. *Cf. Fox Television Stations, Inc.*, 556 U.S. at 515. How an expansion of Medicaid eligibility will lead to less enrollment is beyond rational explanation. Courts need not check common sense at the door when reviewing agency action. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) ("Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'").

Fourth, despite just having argued that Pathways' qualifying hours requirement would prevent enrollment in Medicaid, Defendants in the next breath (at 20-21) assert that Pathways will not incentivize work because most of the eligible population already meets the qualifying hours requirement. Defendants cannot have it both ways. And these irreconcilable positions are strong evidence of a contrived reason. *See New York*, 139 S. Ct. at 2575 (action not reasoned when record

[3] Defendants fault (at 24 n.14) Georgia for not setting out specific numbers regarding reliance in its response to CMS's Initial Determination. But CMS was unequivocally on notice of these facts given the extensive correspondence between the State and the agency over the course of the demonstration's implementation. *See, e.g.*, Ex. 9 at 92 (noting that Georgia budgeted $27,169,720 for fiscal year 2021 through the first quarter of 2023 for the development of the Georgia Gateway system components, improvements, and project management functions necessary for successful implementation of Pathways). That is more than sufficient to preserve the issue in this non-adjudicatory proceeding. *Cf. Mahon v. U.S. Dep't of Agric.*, 485 F.3d 1247, 1255 (11th Cir. 2007). The notion that CMS was unaware that Georgia had made massive investments of time and resources in the Pathways program blinks reality.

reveals a "significant mismatch between the decision the Secretary made and the rationale he provided").

Fifth, Defendants point to (at 21) the reporting requirement as an impediment to expanding coverage. But that concern was addressed thoroughly in the Approval by requiring Georgia to "accommodate beneficiaries who may have trouble reporting their hours due to a disability" through "reasonable recommendations." Ex. 2 at 15. CMS, though, completely ignores this accommodation and nowhere addresses its prior findings regarding reporting.

Sixth, CMS again doubles down (at 22) on COVID-19. But it still cannot explain how *expanding* coverage in a pandemic would not promote the objectives of Medicaid. And Defendants continue to gloss over the fact that the Approval, which was issued during the height of the COVID-19 pandemic, extensively analyzes the matter and sets out several accommodations to address concerns about the pandemic's impact. Defendants can only complain that there is no accommodation for caregiving. But that is simply not true—Pathways anticipates such categories of problem by including a "good cause" exception that includes a wide range of reasons to have a relaxed compliance requirement including an open-ended grant to Georgia of authority to grant exceptions for "other good cause reasons as defined and approved by the State." Ex. 2 at 5. And if caregiving was such a concern to CMS, the tailored solution would be to seek to reach an accommodation with the State, as CMS did with other COVID-related matters, rather than rescind the core of the demonstration. CMS never addresses its previous finding that these accommodations adequately address the pandemic.

Seventh, CMS asserts (at 22-23) that Georgia did not respond to concerns it raised in the preliminary determination about the impact on low-income beneficiaries. But it is hard to see how a program that for the first time opens Medicaid to new categories of low-income Georgians raises impediments to low-income Georgians in attaining Medicaid coverage. Moreover, the Approval and STCs address this issue exhaustively by creating the good cause exception noted above:

> Georgia will also allow beneficiaries enrolled in the demonstration who have been compliant with the qualifying hours and activities, but become unable to comply with the requirements due to circumstances that give rise to good cause for non-compliance, a maximum of 120 hours of non-compliance during the 12-month benefit year. These good cause circumstances include, but are not limited to: the beneficiary or immediate family member is hospitalized; the beneficiary or an immediate family member experiences a serious illness; the beneficiary experiences a short-term injury or illness; the beneficiary experiences the birth, adoption, or death, of an immediate family member; the beneficiary accepts a foster child or kin-ship care placement; the beneficiary experiences a natural or human-caused disaster (including a public health emergency); the beneficiary has a family emergency or other life event (e.g., divorce, civil legal matter, or is a victim of domestic violence); the beneficiary is temporarily homeless; or other good cause reasons as defined and approved by the state.

Ex. 2 at 5 (emphasis added). And CMS specifically acknowledged COVID-19 and explained Georgia's required mitigation measures:

> The state has included, in the demonstration terms and conditions, specific circumstances that give rise to good cause for non-compliance with the qualifying hours and activities requirement. These circumstances include those that may be associated with future public health emergencies, as well as those related to beneficiaries who may be quarantining in response to having COVID-19 symptoms, a COVID-19 diagnosis, or exposure to COVID-19. The state will also take into account the potential closure, related to COVID-19, of the place(s) where the beneficiary was meeting the requirement and as a result, is unable to fulfill the hours and activities requirement. Further, expanding Medicaid coverage to individuals not previously eligible will have significant positive impact on access to health care during and after a public health emergency.

Ex. 2 at 14.

Additionally, the STCs specifically require Georgia to conduct education and outreach, yet the Recission simply dismisses this out of hand. *See* Ex. 2 at 19 ("The STCs also require the state to provide outreach and education to stakeholders regarding the qualifying hours and activities requirement and to provide related information on the state's website."). The Recission has the gumption to fault Georgia for not developing further outreach plans—but Georgia did not take these steps *only because CMS preliminarily determined that it would rescind the demonstration*. *See* Ex. 7 ("Pursuant to the CMS letter issued February 12, 2021, we understand that CMS is continuing its examination of the status of the authorities approved for the Pathways demonstration by the prior administration and appreciate the

continued discussions. Accordingly, as we rapidly approach the previously approved implementation date of July 1, 2021 to make Pathways available to Georgia's citizens, we are proposing to delay the go-live date until at least August 1, 2021."). Finally, the Recission's demand that Georgia provide evidence of how a requirement that individuals hold jobs or other positions furthering the community would "generat[e] greater levels of employment" is self-evidently arbitrary. Ex. 8 at 34. And CMS's demand for such evidence before the program has even been launched undermines the nature and purpose of Section 1115 demonstrations, which are intended "to test out new ideas and ways of dealing with the problems of public welfare recipients." S. Rep. No. 87-1589, at 19 (1962).

B. Defendants' attempted justifications for the Recission fail.

Defendants raise scattershot arguments that fail to undermine Georgia's demonstration of multiple independently sufficient reasons why the Recission is arbitrary and capricious.

First, Defendants cannot avoid the simple fact that the Recission means Georgia Pathways will not go into effect and tens of thousands of Georgians will not gain coverage as a direct result. Defendants assert (at 23-24) that Georgia waived this argument by not raising it in its correspondence with CMS. But waiver plainly does not apply to this non-adjudicative situation. Defendants rely on *Mahon v. Department of Agriculture* to assert that Georgia waived its "right to raise this argument now in litigation." But *Mahon* is clear that "where an administrative proceeding is not adversarial, the reasons for requiring issue exhaustion are much weaker." 485 F.3d 1247, 1255 (11th Cir. 2007). Issue exhaustion plainly does not apply to this non-adjudicative proceeding that was not even conducted under normal APA procedures. In any event, Georgia did raise this argument explicitly in its correspondence with CMS: "[A]ny attempt to excise the qualifying hours and activities *would make it*

impossible to effectuate the expansion as is the qualifying hours and activities are core to the waiver." Ex. 6 at 4 (emphasis added).[4]

Second, Defendants (at 24-25) rehash their argument that providing healthcare for those who enter the workforce or engage in other community engagement activities will not spur additional employment. As an initial matter, this position ignores that Section 1115 is designed to test such propositions. And the assertion that Pathways does not account for things such as caregiving is simply not true given the good cause exceptions to reporting requirements and community engagement requirements. Defendants (at 25) also have the chutzpah to say that it is actually "*Georgia* that is choosing to decrease Medicaid coverage." But Georgia chose to *increase* Medicaid coverage through an innovative program. CMS chose to fundamentally upend this program by removing several of its central components. It thus strains credulity for CMS to suggest that Georgia is somehow seeking to decrease coverage when it is CMS that has upended the carefully negotiated terms at the heart of the demonstration program.

Third, Defendants (at 25-26) state that the Recission does not "rely on impermissible factors." But in the next breath, Defendants concede that CMS issued the Recission at least in part to "facilitate" the Administration's "priority in advancing health equity." And the agency never presented the health equity rationale as independent from other sufficient bases—Defendants' attempt to present it as "independent" is nothing but a post hoc litigating position. Accordingly, Defendants cannot dispute that CMS "relied on factors which Congress has not intended it to consider." *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007) (action arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider").

[4] Contrary to Defendants' assertion (at 24 n.14), given the extensive correspondence between CMS and Georgia working toward implementing Pathways, CMS cannot now claim that it was not on notice of Georgia's reliance interests. *See, e.g.*, AR 3944-4145 (Three Quarterly Reports and One Annual Monitoring Report (Oct. 1, 2020 – Sept. 30, 2021)).

Fourth, Defendants state (at 26) that no coercion is at play here. Yet this litigation is the greatest evidence that a coercive bait-and-switch has occurred. Defendants consistently state that Georgia can "work with" CMS to find a "mutually agreeable" solution, which—based on the Recission—can mean only one thing: condition-free Medicaid expansion. But Georgia already worked with CMS for years to find a "mutually agreeable" solution only to have the carefully negotiated program upended before it even went into effect. Yet CMS now demands condition-free expansion, or a complete loss of all the resources and investments Georgia has made in Pathways. Georgia did not "voluntarily and knowingly" sign up for this. *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012).

Fifth, Defendants assert (at 26-27) that COVID-19 represents a fundamentally new factual circumstance that necessitated a complete reversal of course. The problem: COVID-19 existed and was arguably at its height when Pathways was approved. And Georgia and CMS engaged in extensive discussions to account for the effects of COVID on the demonstration. *See* Ex. 10; Ex. 1 at 17-18. Specifically, the STCs account for COVID in no uncertain terms by "agreeing to excuse compliance with the qualifying hours requirement for 'good cause' when a 'beneficiary is quarantining in response to having COVID-19 symptoms, a COVID-19 diagnosis, exposure to COVID-19, or because of a closure of the place(s) where the beneficiary was meeting the hours requirement related to COVID-19 and as a result, is unable to fulfill the hours and activities requirement.'" Ex. 1 at 17-18. CMS nowhere explains in the Recission why such accommodations—which were adopted in direct response to specific concerns raised by CMS—have now become inadequate to address its concerns.

The supposedly "new data" that CMS identifies (at 26)—lack of childcare, increased transportation barriers, discrepancies in internet accessibility, and unemployment—all existed at the time of the Approval. And CMS and Georgia specifically accounted for them by specifying that COVID exposure and care would qualify as good cause for noncompliance with the qualifying hours requirement. Ex. 2 at 14. Moreover, there is a "significant mismatch" between CMS's concern with

"lingering health complications" and CMS's solution of rescinding a program that expands healthcare coverage. *New York*, 139 S. Ct. at 2575.

Defendants also fail to address CMS's specific findings regarding the impact of COVID-19 on "mental and physical health" including "factors such as a lack of economic participation, social isolation, and other economic stressors have negative impacts on mental and physical health." Ex. 2 at 1 n.1. Defendants are completely silent on this finding and CMS's previous conclusion that "incentives and requirements that increase such participation may have a positive effect on beneficiary health and economic mobility." *Id.* CMS cannot "whistle past that factual graveyard." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 927 (D.C. Cir. 2017).

Seventh, despite asserting (at 17-18) that determining the appropriate baseline against which to judge Pathways is a matter for arbitrary and capricious review rather than statutory review, Defendants neglect the baseline issue entirely. CMS expressly used a full expansion baseline in the Recission. *See, e.g.*, Ex. 8 at 5 ("Therefore, conditioning initial and continued access to health coverage on completing a work requirement during an ongoing pandemic will only work to hinder the overall wellbeing of low-income Georgians, including with respect to their health and employment status. CMS currently does not believe that any potential benefits of the work requirement outweigh their likely negative consequences, and thus does not believe that the demonstration is likely to further the purposes of Medicaid with this requirement included."). As explained above, this methodology means that no demonstration short of full, condition-free expansion would ever pass muster under Section 1115. As Georgia explains in its summary judgment motion (at 23):

> Pathways obviously *expands* coverage to tens of thousands of otherwise-ineligible individuals—that is its very purpose. It was only by drawing a false comparison with a world that does not exist—full expansion in Georgia—that CMS could reach the counterintuitive conclusion that the qualifying hours requirement would somehow contract coverage. *Cf. Leather Indus. of Am., Inc. v. EPA*, 40 F.3d 392, 405 (D.C. Cir. 1994) (decision based on erroneous baseline arbitrary and capricious).

Defendants simply have no response.

Eighth, Defendants (at 28-29) attempt to excuse CMS's erroneous reliance on fundamentally different Medicaid demonstrations not by analogizing Pathways to those different demonstrations but instead by arguing that Pathways somehow makes obtaining coverage *more difficult* to obtain coverage. But this is flatly contrary to reality. Pathways opens up coverage to an entirely new, currently uncovered population. It *expands* enrollment. By contrast, the comparator State demonstrations impose work requirements on existing Medicaid beneficiaries in an attempt to *reduce* enrollment.[5]

Finally, Defendants fail to refute (at 29) the pretextual nature of the Recission. Defendants have never been able to come to terms with the fact that Pathways would expand Medicaid coverage. Instead, the only reasonable explanation is that the Recission seeks to impose condition-free expansion upon Georgia in order to maximize the number of eligible beneficiaries. But that is simply not an option available to the agency. None of the factual flyspecking in the Recission can change the fact that Pathways as enacted was a carefully and comprehensively negotiated program that *directly addressed* each of the issues that Defendants now claim to be existential flaws in the program. CMS's apparent willingness to sink the program altogether rather than allow Georgia to impose flexible and easily met conditions on the expansion reflects a fundamental "disconnect between the decision made and the explanation given." *New York*, 139 S. Ct. at 2575.

IV. The Recission Violates the APA's Notice and Comment Requirement.

Defendants (at 29-30) can cite no authority rebutting the fundamental administrative law rule that there is "no distinction ... between initial agency action and subsequent agency action undoing or revising that action." F*.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Thus, agencies must "follow the same process to revise a rule as it used to promulgate it." *Clean Water Action v. United States*

[5] Again, contrary to Defendants' repeated assertion (at 28), Pathways does address issues such as caregiving by allowing the State to grant good cause exceptions. And if the caregiver issue was really the driving force behind the Recission, CMS could have attempted to work with Georgia to address this specific issue rather than withdrawing the core of the demonstration.

Envtl. Prot. Agency, 936 F.3d 308, 312 (5th Cir. 2019) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 100 (2015)). Section 1115 expressly requires notice and comment for demonstration approvals. *See* 42 U.S.C. §1315(d)(2) (requiring "a process for public notice and comment at the State level, including public hearings, sufficient to ensure a meaningful level of public input" prior to approval of "applications for, and renewals of, a demonstration project"). CMS went through this process in approving Pathways. *See* Ex. 2 at 11-12. Accordingly, the Recission was required to go through the same process of the Approval. Because it did not, the Recission must be vacated.

V. The Recission Is Arbitrary and Capricious and Contrary To Law Because It Violates the Agreement of January 4, 2021, Between Georgia and CMS.

Defendants' attempt (at 31) to play off the January 4 Agreement as a run of the mine government procurement contract falls apart on closer inspection. Each case Defendants cite is a suit for money damages in the Court of Federal Claims. By contrast, Georgia here seeks declaratory and injunctive relief vacating a final agency action in direct violation of an agreement between two sovereign parties. Georgia does not seek money—it seeks to hold the federal government to the procedures it agreed to be bound by. The January 4 Agreement is thus far more akin to the agreements the Fifth Circuit found enforceable in *Texas v. Biden*:

> The Agreement between DHS and Texas underscores the reliance interests at play—and DHS's awareness of them. The Agreement stipulated, inter alia:
> • "Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement."
> • "The harm to Texas is particularly acute where its budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes."
> • "[A]n aggrieved party will be irreparably damaged."
>
> And the Agreement went on to describe itself as "a binding and enforceable commitment between DHS and Texas." Thus, the Agreement both demonstrates DHS's prior knowledge of the States' reliance interests and affirmatively created reliance interests all its own. DHS's failure to consider those interests when it terminated MPP was arbitrary and capricious.

Texas, 20 F.4th at 989-90.[6] Accordingly, the January 4 Agreement, which "outlin[es] additional details of the process" for withdrawing Pathways remained in effect and was blatantly violated by the Recission. Ex. 3 at 2.

VI. The Recission Violates the Spending Clause.

Defendants assert (at 34) that Georgia cannot assert a Spending Clause claim against CMS because no statute expressly sets out the challenged conditions. This makes Georgia's claim stronger rather than weaker because "Congress' intent" must be "certain" before "federal law overrides the usual constitutional balance of federal and state powers." *See, e.g*, *Bond v. United States*, 572 U.S. 844, 857-58 (2014).

Defendants assert (at 35-36) that CMS "in no way required, coerced, or otherwise pressured the state into implementing a demonstration project." But this ignores the fact that the Recission puts Georgia to the untenable choice of sacrificing the significant sums it has spent in reliance upon the Approval or acquiescing in full Medicaid expansion. Georgia did not "voluntarily and knowingly accepts the[se] terms." *NFIB*, 567 U.S. at 577.

[6] As here, shortly after the change in administrations, the Biden Administration "sent a letter to Texas purporting to terminate the Agreement 'effective immediately.'" *Texas*, 20 F.4th at 944-45.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss and motion for summary judgment, grant Georgia's Motion for Summary Judgment, and set aside the Recission as arbitrary and capricious and contrary to law.

Respectfully submitted,
/s/ Jeffrey M. Harris

Chris Carr
Attorney General of Georgia
Stephen Petrany
Solicitor General
Office of the Georgia Attorney General
40 Capitol Square SW
Atlanta, GA 30334
(404) 458-3409

Jeffrey M. Harris*
Daniel Shapiro*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com
daniel@consovoymccarthy.com
Special Assistant Attorneys General
* admitted pro hac vice

G. Todd Carter, Esq.
Georgia Bar No: 113601

Paul M. Scott, Esq.
Georgia Bar No: 140960
BROWN, READDICK, BUMGARTNER, CARTER, STRICKLAND & WATKINS, LLP
5 Glynn Avenue
P. O. Box 220
Brunswick, GA 31521-0220
Tel: 912-264-8544
Fax: 912-264-9667
Email: tcarter@brbcsw.com
pscott@brbcsw.com
Local Counsel

Dated: May 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was electronically filed with the Clerk of Court using the CM/ECF system on May 26, 2022, thereby serving all counsel of record.

/s/ Jeffrey M. Harris
Jeffrey M. Harris